Supreme Court, U.S.
FILED

(1)

99 487 JUL 30 1999

No.

OFFICE OF THE CLERK

In the
Supreme Court of the United States

SANDER P. STAGMAN,

Petitioner,

v.

JAMES RYAN, JOSEPH CLAPS, EDWARD LUDWIG, and RICHARD JONES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL J. FOLEY
Counsel of Record
FOLEY & FOLEY
9644 South Hamilton Avenue
Chicago, Illinois 60643-1631
(773) 881-3800

Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

17 pp

QUESTION PRESENTED FOR REVIEW

This petition for a writ of certiorari presents three questions: First, whether the Seventh Circuit's decision that a party's deposition could proceed only by a demonstration of need is in conflict with all other circuits and every district court which has considered the issue. Second, whether the Seventh Circuit has eviscerated the *McDonnell-Douglas* method of indirect proof by permitting a *prima facie* retaliation case to be rebutted by a simple denial. Third, whether this Court needs to reaffirm the federal rule requiring all evidence and inferences in summary judgment proceedings be considered in the non-movant's favor where the Seventh Circuit made numerous factual and credibility determinations in favor of the movant.

LIST OF ALL PARTIES TO PROCEEDINGS IN THE APPELLATE COURT

The caption to the case contains the names of all the parties.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

REFERENCE TO REPORTS OF OPINIONS 1

STATEMENT OF JURISDICTIONAL GROUNDS 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASON FOR GRANTING THE WRIT 3

INTRODUCTION 3

I.

THE COURT'S DECISION THAT A PARTY'S DEPOSITION COULD PROCEED ONLY BY A DEMONSTRATION OF NEED IS IN CONFLICT WITH ALL OTHER CIRCUITS AND EVERY DISTRICT COURT WHICH HAS CONSIDERED THE ISSUE 4

II.

BY PERMITTING A *PRIMA FACIE* RETALIATION CASE TO BE REBUTTED BY A SIMPLE DENIAL, THE DECISION BELOW HAS EVISCERATED THE *McDONNELL-DOUGLAS* METHOD OF INDIRECT PROOF 8

III.

THE RULE THAT ALL EVIDENCE AND ALL INFERENCES FROM THE EVIDENCE SHALL BE CONSIDERED IN THE NON-MOVANT'S FAVOR IN A SUMMARY JUDGMENT PROCEEDING MUST BE REAFFIRMED 11

CONCLUSION 13

APPENDIX . . . . . *infra*

TABLE OF AUTHORITIES

Cases PAGE

Affiliated FM Insurance Co. v. Neosho Construction Co., Inc., ___ F.Supp.2d ___, 1999 WL 445704 (D. Kans. 6/24/99) 5

Avitia v. Metropolitan Club, 49 F.3d 1219 (7th Cir. 1995) 9

Clinton v. Jones, ___ U.S. ___, 117 S. Ct. 1636 (1997) 8

Connor v. Schmuck Markets, 121 F.3d 1390 (10th Cir. 1997) 9, 12

Culp v. Devlin, 78 F.R.D. 136 (E.D. Pa. 1978) 5

Gile v. United Airlines, 95 F.3d 492 (7th Cir. 1996) 7

Hunter v. Habegger Corp., 139 F.3d 901 (7th Cir. 1998) 9

In re Grand Jury Subpoena Duces Tecum, 158 F.3d 1253 (D.C. Cir. 1999) 8

Kuwait Airways Corp. v. American Security Bank, 1987 WL 11994 (D.D.C. 1987) 6

Matthews v. Trilogy, 143 F.3d 1160 (8th Cir. 1998) 9

McDonnell-Douglas Corp. v. Green,
431 U.S. 792 (1973) 8, 9

Mike v. Dymon, Inc.,
169 F.R.D. 376 (D. Kan. 1996) 5

Moore v. Kuka, 171 F.3d 1073
(6th Cir. 1999) 9

Naftchi v. New York University Medical Center, 172 F.R.D. 130
(S.D.N.Y. 1997) 5

N.F.A. Corp. v. Riverview Narrow Fabrics, Inc., 117 F.R.D. 83
(M.D. N.C. 1987) 5

Pickering v. Board of Education,
391 U.S. 563 (1968) 9

San Juan v. IBP, Inc.,
160 F.3d 1291 (10th Cir. 1998) 9

Shoemaker v. National Management Resource Corp., 141 F.3d 1185
(10th Cir. 1998) 11

Texas Department of Employment Security v. Burdine, 450 U.S.
248 (1981) 9

Thomas v. International Business Machines, 48 F.3d 478
(10th Cir. 1995) 6

United States v. Nixon, 418 U.S. 683, 94 S. Ct. 3090 (1990) 5, 8

Vasbinder v. Ambach, 926 F.3d 1333 (2d Cir. 1991) 9

Constitutional Provisions

U.S. Const., Amend. I 1

U.S. Const., Amend. V 1

U.S. Const., Amend. XIV 1

Statutes

Federal Rules of Civil Procedure 30(a) 5

Federal Rules of Civil Procedure 31(a) 5

Federal Rules of Civil Procedure 56 11

PETITION FOR WRIT OF CERTIORARI

The petitioner, Sander P. Stagman, respectfully petitions This Honorable Court to issue a writ of certiorari to the Seventh Circuit Court of Appeals.

REFERENCE TO REPORTS OF OPINIONS

The published decision of the Seventh Circuit Court of Appeals was filed on May 6, 1999 (*Stagman v. Ryan*, ___ F.3d ___ (7th Cir. 1999)) and appears as Appendix A to this petition. The unpublished opinion of the Northern District of Illinois was filed on April 24, 1997 (*Stagman v. Ryan*, 98 C 8012) and appears as Appendix B to this petition.

JURISDICTION OF THE UNITED STATES SUPREME COURT

The decision of the Seventh Circuit Court of Appeals was issued May 6, 1999. (Appendix A) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, "Congress shall make no law abridging the freedom of speech. . ."

The Fifth Amendment to the Constitution of the United States provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . ."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part: "Section 1.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Plaintiff, an accountant with the Office of the Illinois Attorney General, engaged in a series of expressive and associational actions in connection with his Local Union. Defendant Ludwig, Plaintiff's supervisor, and Defendant Jones, Plaintiff's Local President, conspired to remove Plaintiff from collective bargaining responsibilities. Subsequently, in retaliation for additional expressive and associational activities, Defendants Ryan, Claps, and Ludwig determined to fire the Plaintiff. Defendants Ludwig and Jones then agreed to have Plaintiff arrested if he attempted to vote or electioneer in the Local Union election in which he was a candidate and to move the election site to make it easier to do so. Defendant Jones determined not to provide the assistance ordinarily provided to union members when Plaintiff filed a grievance regarding his dismissal, in furtherance of the Defendants' scheme to retaliate against and halt Plaintiff's expressive and associational conduct. Plaintiff's complaint before this Court is brought under 42 U.S.C. §1983, alleging violations of his First Amendment rights by all Defendants. On March 25, 1998, the district court entered summary judgment in favor of Defendants. Plaintiff filed a timely Notice of Appeal. On May 6, 1999, the Seventh Circuit Court of Appeals affirmed the lower court's order.

REASONS FOR GRANTING THE WRIT

This Petition Should Be Granted For Any Of Three Reasons: First, The Seventh Circuit Has Improperly Required A Demonstration Of Need To Be Shown Before A Party's Deposition Can Proceed. This Showing Is In Conflict With All Other Jurisdictions That Have Considered The Issue. Secondly, The Seventh Circuit's Decision To Allow Rebuttal By Simple Denial Greatly Weakens This Court's Finding In *McDonnell-Douglas v. Green* And Following Cases, Which Allows An Indirect Method Of Proof Permitting A Rebuttable Presumption Of Discriminatory Intention. Finally, Although Federal Rule Of Civil Procedure 56 Requires All Evidence And Inferences In Summary Judgment Proceedings To Be In Favor Of The Non-Movant, The Seventh Circuit Inexplicably Made Numerous Key Factual And Credibility Determinations Drawing Inferences In Favor Of The Movant.

INTRODUCTION

This case is a direct appeal from an entry of summary judgment against Plaintiff who had alleged the termination of his employment in retaliation for his associational and expressive activities in violation of rights secured to him by the First Amendment of the United States Constitution. There are three parts to Petitioner's argument. In the first part, Petitioner will establish that in stark contrast to all other jurisdictions, the Seventh Circuit arbitrarily and improperly placed the burden on Petitioner to prove his case

through demonstrated need before he could proceed with a party's deposition. In the second part, the Petitioner will establish that this Court must overturn the Seventh Circuit's finding in this case allowing rebuttal by simple denial in a *prima facie* retaliation case in order to preserve the method of indirect proof as directed by the *McDonnell-Douglas* case. Finally, the Petitioner will establish the fundamental need of this Court to reaffirm Federal Rule of Civil Procedure 56, which requires all evidence and inferences in summary judgment proceedings be considered in favor of the movant, in light of the Seventh Circuit's decision which made numerous factual and credibility determinations in favor of the movant.

I.

THE COURT'S DECISION THAT A PARTY'S DEPOSITION COULD PROCEED ONLY BY A DEMONSTRATION OF NEED IS IN CONFLICT WITH ALL OTHER CIRCUITS AND EVERY DISTRICT COURT WHICH HAS CONSIDERED THE ISSUE.

The Appeals Court erred in declining to permit the deposition of one of the Defendants on the central issues of his knowledge of Plaintiff's expressive conduct and responsibility for Plaintiff's dismissal. In affirming the decision of the trial court to bar the deposition of Defendant Attorney General Ryan, the Court of Appeals improperly erected a permissive "need to know" standard for deposing very important persons and placed an uncertain evidentiary burden on litigants. Although Plaintiff established through competent evidence that the Defendant had told a third party that he personally made the decision to fire Plaintiff, the lower courts

declined to permit his deposition. This decision is an open invitation for future courts to curtail the rights of litigants to every person's evidence on the thinnest of rationales. This decision conflicts with all previous decisions on this issue in a number of other circuits.

The Federal Rules of Civil Procedure permit the deposition of "any person". FRCP 30(a) & 31(a). Exceptions to the demand for every man's evidence, "are not lightly created nor expansively construed, for they are in derogation of the search for the truth." *United States v. Nixon*, 418 U.S. 683, 710, 94 S. Ct. 3090 (1974). Due to the broad scope of discovery, it is "exceedingly difficult to demonstrate an appropriate basis for an order barring the taking of a deposition" in most courts in this land. *Naftchi v. New York University Medical Center*, 172 F.R.D. 130, 132 (S.D.N.Y. 1997); *Affiliated FM Insurance Co. v. Neosho Construction Co., Inc.*, ___ F.Supp.2d ___, 1999 WL 445704, 445704 *3 (D. Kans. 6/24/99). Courts have rarely granted a protective order which totally prohibits a deposition unless extraordinary circumstances are present, terming such an order "drastic action". *Mike v. Dymon, Inc.*, 169 F. R. D. 376, 378 (D. Kans. 1996); *Neosho, id., supra*; *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83, 84 (M.D. N.C. 1987). The fact that a person may be busy does not confer a privilege against giving testimony entirely. *Culp v. Devlin*, 78 F.R.D. 136 (E.D. Pa. 1978).

There was no showing of extraordinary circumstances in the instant case. Rather, the Defendant, Illinois Attorney General James Ryan, simply plead ignorance and the absence of personal responsibility as the basis for the extraordinary order barring the deposition. The general rule respecting such claims of ignorance has

been that they should be tested by the discovery process. *Kuwait Airways Corp. v. American Security Bank*, 1987 WL 11994 (D.D.C. 1987). That is particularly true in a case such as this where Defendant Ryan admitted to an affidavit witness that Ryan had made the decision to terminate the Plaintiff himself, based on information provided by his staff. (Plaintiff's Exhibit 9 to Response to Defendants' Motion for Summary Judgment.)

Previous cases granting orders of protection barring the depositions of high executives and public officials presented extraordinary circumstances requiring the intervention of the court. For example, in *Thomas v. International Business Machines*, 48 F.3d 478, 482-83 (10th Cir. 1995), counsel deposed no I.B.M. managers, waited until the eve of trial to notice the deposition of the Chairman of the Board of a Fortune 500 corporation, did not follow the time frame of Local Rules in doing so, and noticed the deposition for Oklahoma City, not I.B.M.'s principal place of business. The court was provided an unrebutted affidavit that asserted both a lack of personal knowledge of any fact relative to the opposing party and that the proposed deposition presented a severe hardship. Finally, the evidence that the deponent could have provided was not relevant to the claim actually made.

No extraordinary circumstance was presented by the deposition in this case. All other decision-makers were deposed. There was before the court an admission by Defendant Ryan that Ryan made the termination decision at issue himself. Defendant never moved for a protective order. Rather, he unilaterally refused to appear for any deposition on any date, a fact which the

Plaintiff raised with the trial court. (Record of October 27, 1998 court appearance). Of course, no previous reported decision denied a party the right to depose a party to the proceeding who had admitted making the decision at issue in the ordinary course of proceedings.

There was no showing in this record of exceptional circumstances, oppression or undue hardship to justify the extraordinary remedy of barring a deposition entirely. Rather, the Court of Appeals fledged a "need" standard for Plaintiff to meet before obtaining the evidence, combined with the abuse of discretion standard generally applicable to appellate supervision of discovery. The Court's decision to substitute its judgment of what the litigants needed to know is unprecedented outside the Seventh Circuit, particularly after the Plaintiff demonstrated Defendant's knowledge and responsibility by competent evidence.

Compounding the error, the trial court entered summary judgment for Defendant Ryan on precisely the issues of knowledge and responsibility which were the key issues to be plumbed in the barred deposition. (Order of March 24, 1998). In affirming the trial court's entry of summary judgment, the Seventh Circuit Court of Appeals effectively reversed its own recent decision recognizing that entry of summary judgment on issues where discovery had been barred is an abuse of the trial court's discretion. *Gile v. United Airlines*, 95 F.3d 492, 499 (7th Cir. 1996).

When this Court has been faced with issues of Executive Privilege in the past decades, it has always sided firmly with the Common Law tradition that every man's evidence must be made available. Position does

not confer a privilege to suppress the truth. *Clinton v. Jones*, ___ U.S. ___, 117 S. Ct. 1636 (1997); *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090 (1974). Following this line of reasoning, most lower courts have endeavored to maintain a free flow of information in the discovery process, as intended by the Federal Rules. *In re Grand Jury Subpoena Duces Tecum*, 158 F.3d 1263, 1267 (D.C. Cir. 1999). In applying the deferential "need to know" standard for barring a party's deposition without reference to any "extraordinary circumstances", the Court below has spawned a new and ill-defined privilege for V.I.P.'s, created a conflict between the recognized law in other circuits and the Seventh Circuit, and engendered future discovery disputes which are entirely unnecessary. Plaintiff respectfully urges the Court to grant his petition for *certiorari* in this case to address this issue.

II.

BY PERMITTING A *PRIMA FACIE* RETALIATION CASE TO BE REBUTTED BY A SIMPLE DENIAL, THE DECISION BELOW HAS EVISCERATED THE *McDONNELL-DOUGLAS* METHOD OF INDIRECT PROOF.

This Court long ago recognized that direct proof of discrimination will not be available in the ordinary case. It is not often that the invidiously discriminating decision-maker will speak frankly about discriminatory motives in the presence of the plaintiff or of disinterested witnesses. Accordingly, the court has created an indirect method of proof permitting a plaintiff to raise rebuttable presumption of discriminatory intention through simple methods of proof. *McDonnell-Douglas*

Corp. v. Green, 431 U.S. 792 (1973); *Texas Department of Employment Security v. Burdine*, 450 U.S. 248 (1981). Because of its enduring usefulness, lower courts throughout the nation have extended this indirect method of proof to other areas, including the proof of retaliation in a *Pickering-type* First Amendment case. *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731 (1968); *Vasbinder v. Ambach*, 926 F.3d 1333, 1340 (2d Cir. 1991). Initially, retaliation cases in all federal employment-related litigation are proven by showing a protected activity and a close relationship in time between the protected activity and the adverse employment action. *Moore v. Kuka*, 171 F.3d 1073, 1079 (6th Cir. 1999) (Title VII); *San Juan v. IBP, Inc.*, 160 F.3d 1291, 1299 (10th Cir. 1998) (Worker's Compensation retaliation); *Matthews v. Trilogy*, 143 F.3d 1160, 1166 (8th Cir. 1998) (ERISA retaliation); *Conner v. Schmuck Markets*, 121 F.3d 1390, 1395 (10th Cir. 1997) (Fair Labor Standards Act retaliation). The closer in time the protected activity is to the adverse action, the stronger the presumption will be. *Conner v. Schmuck Markets*, 121 F.3d 1390, 1395 (10th Cir. 1997) (contrasting a four month gap with a two hour gap between protected activity and adverse action). Only in the Seventh Circuit has this evidentiary presumption been repeatedly questioned and treated as a mere inference without significant evidentiary weight. *Hunter v. Habegger Corp.*, 139 F.3d 901, 1998 WL 104635, 104635*14 (7th Cir. 1998); *Avitia v. Metropolitan Club*, 49 F.3d 1219, 1225 (7th Cir. 1995).

In the instant case, although the alleged misconduct occurred four months earlier, Defendants suspended Plaintiff and barred him from the premises one busi-

ness day before the union election contest in which he was a candidate and terminated him the day after the election. One of the key decision-makers expressly tied the discipline to the election date and proceedings.

While the presumption of discrimination is rebuttable, a general denial either of knowledge or retaliatory intent cannot suffice to rebut the *prima facie* case in considering a motion for summary judgment. In the instant case, Defendants James Ryan and Joseph Claps were dismissed out based on their denial of knowledge of Plaintiff's expressive and associational activities, despite the presence at the termination conference of Defendant Edward Ludwig who had both knowledge of the Plaintiff's associational and expressive conduct and an express retaliatory animus, Ludwig's express linking of the discipline dates and the election, and the very close nexus between the protected conduct and the dismissal.

Mere denials of knowledge and intent, standing alone, cannot permissibly rebut a *prima facie* case of retaliation in a summary judgment proceeding. The effect of such a rule would eviscerate the *McDonnell-Douglas* test. If a simple denial of knowledge or intent could suffice to rebut the *prima facie* case, then virtually every case where the Defendant denies an intent to discriminate or retaliate would be decided effectively at the pleading stage. The Supreme Court which has been the guardian of Americans' Constitutional rights since the Republic's inception must review and reverse this perverse application of the *McDonnell-Douglas* test.

III.

THE RULE THAT ALL EVIDENCE AND ALL INFERENCES FROM THE EVIDENCE SHALL BE CONSIDERED IN THE NON-MOVANT'S FAVOR IN A SUMMARY JUDGMENT PROCEEDING MUST BE REAFFIRMED.

In the instant case, the Court of Appeals has made a number of gross factual determinations and credibility determinations contrary to the well-settled and express textual rule that when considering a motion for summary judgment courts must interpret the evidence in the light most favorable to the non-moving party. FRCP 56; *Shoemaker v. National Management Resource, Corp.*, 141 F.3d 1185, 1998 WL 165164, 165164 *3 (10th Cir. 1998). Each critical issue decided in the decision is marred by this defect. For example, Defendant Ryan's admission that he made the decision to terminate the Plaintiff is somehow transmogrified in the appeals court opinion into a "staff decision" not made by Ryan. Stephen Culliton, whom the Defendants allege made the dismissal decision, is characterized in the opinion as unaware that Plaintiff had any union role. Culliton received a grievance from Plaintiff identifying him as a union steward only weeks before the dismissal decision. (Plaintiff's Exhibit 10) Defendants' attempt to manufacture an alternative ground for Plaintiff's dismissal which was admitted by his supervisor to Plaintiff and an independent witness is mis-characterized as misconduct on Plaintiff's part. The immediate supervisor's admission that he was directed to discipline for pretexts until a sufficient reason for dismissal could be established, is completely ignored in the text, even though Defendants provided no evidence on this issue at all. (Plaintiff's Exhibit 22) Defendant Ludwig's express hos-

tility toward Plaintiff based on his expressive conduct is alluded to, but never expressly considered, as it must be. (Plaintiff's Exhibit 9 at ¶ 22, 24 & 33) Defendant Jones' explicit testimony that he decided to move the election in significant part because the new location would make it easier to arrest the Plaintiff if he came to the polling place is described solely as a move "for the convenience of the membership." (Plaintiff's Exhibit 5 at 89)

Perhaps the most questionable of the many questionable decisions made by the Court of Appeals is the omission of all dates from the description of the chain of events, *i.e.*, the disciplinary incident, the beginning of the investigation of the incident, the manager's internal dismissal conference, the election, suspension, and dismissal. Since the ordinary rule is that the closer a protected expressive activity is to an adverse action, the stronger the inference that improper considerations motivated the adverse action, and the Plaintiff was suspended one day before the election and fired one day after for acts occurring four months earlier, it is improper that these facts were not expressly considered in this case as they are in virtually every other decision on the issue. *Conner v. Schmuck Markets,* 121 F.3d 1390, 1395 (10th Cir. 1997).

While the standards for granting summary judgment in recent years may have been relaxed, they have not been abandoned. It is important in preserving the integrity of the judicial system that this Court accept this case to remind all subordinate courts that it has issued no license to make credibility determinations, to omit or mischaracterize evidence, or to draw adverse inferences against the non-moving party. Since this problem goes

to the foundation of respect which the nation has for its courts, it is a significant issue urgently requiring this Court's review.

CONCLUSION

It is contrary to the language and intent of the Federal Rules of Civil Procedure to deny a party the right to another party's evidence, absent an ill-defined demonstration of need by the deposing party. Nor can the method of indirect proof in employment cases remain a useful tool for analysis if rebuttal is achieved for summary judgment purposes by a simple denial. Summary judgment is not permissible where adverse inferences, credibility issues, and conflicts of evidence are determined against the non-movant. For these and other sufficient reasons, Petitioner respectfully urges this Court to reverse the decisions of the courts below and remand this case for trial.

Respectfully submitted,

MICHAEL J. FOLEY
Counsel of Record
FOLEY & FOLEY
9644 South Hamilton Avenue
Chicago, Illinois 60643-1631
(773) 881-3800

Attorneys for Petitioner

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 98-1943

SANDER P. STAGMAN,

Plaintiff-Appellant,

v.

JAMES RYAN, JOSEPH CLAPS,
EDWARD LUDWIG, and RICHARD JONES,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Illinois, Eastern Division.
No. 96 C 8012—**Charles P. Kocoras**, *Judge.*

ARGUED JANUARY 6, 1999—DECIDED MAY 6, 1999

Before POSNER, *Chief Judge*, and COFFEY and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge*. Sander Stagman brought his claims under 42 U.S.C. § 1983 against, in their individual capacities, the Illinois Attorney General, James Ryan, and Joseph Claps and Edward Ludwig, officials with the Office of the Illinois Attorney General ("AG's Office"), as well as Richard Jones, an employee of the AG's Office, who also served as president of the Illinois Federation of Teachers Local 4747 AFT/AFL-CIO ("Union"). Stagman alleges these individuals violated his First Amendment rights to free speech and free assembly through their actions that culminated in his dismissal from the AG's

Office. He challenges the district court's grant of summary judgment in favor of Ryan, Claps, Ludwig, and Jones. We, however, agree with the district court's assessment that Stagman did not establish issues of material fact to support his claims and deny Stagman's appeal.

I. History

From April 1987 until December 1995, the AG's Office employed Stagman as an accountant. His claims relate primarily to four events—a denial of vacation time, his involvement with the Union, an incident with the Palos Heights Police Department, and the Union elections—that occurred during his time with the AG's Office.

The first event occurred during the spring of 1995. In addition to his duties with the AG's Office, Stagman, with the knowledge and approval of the AG's Office, also ran a private accounting business. Because of this outside work, during the spring, he often took vacation time to meet the needs of his private clients. As was his usual practice, Stagman requested vacation time during the spring of 1995. Chief of the Department of Public Safety Joseph Claps approved the request. After learning about Stagman's plan to take a vacation, Edward Ludwig, Chief of the Department of Administration and Stagman's immediate supervisor, asked Claps to cancel Stagman's request because, Ludwig asserted, a backlog of work existed that needed Stagman's attention. Stagman disputes Ludwig's statements about this event. After the permission had been rescinded, Illinois State Senator Howard Carroll interceded on behalf of Stagman. He brought the matter to the attention of Attorney General James Ryan, and Ryan intervened to have Stagman's vacation time restored.

Some time after the resolution of the vacation issue, Stagman became more involved in the Union, which he had joined in 1989. Richard Jones, the president of the Union, recommended Stagman to be one of the Union's stewards. Troubles ensued almost immediately. Stagman

asserts that he pursued his duties aggressively, but always conducted himself appropriately. Jones, however, contends that he received complaints from other Union officers and stewards about Stagman's conduct. As a result, Jones and the other members of the Union's board removed Stagman from his position only one month after he had assumed it. Stagman claims his removal resulted from a complaint from Ludwig regarding Stagman's pursuit of another employee's complaint. Jones, however, contends that Stagman was removed from his Union position because he failed to follow the Union board's direction and cooperate with its members, failed to represent the bargaining unit members responsibly, and interfered with the activities of other stewards. Jones sent a memo to Stagman notifying him of the dismissal. He also forwarded the memo to members of the AG's Office management, including Ludwig, in accordance with the Union's bargaining agreement.

In addition to removing Stagman from the position of steward, the memo also stated that Stagman would not be a member of the Union's bargaining team for its upcoming negotiation session with the AG's Office. Stagman had volunteered to be a part of this team, but at that point had not participated in any bargaining sessions. At the time Jones circulated the memo, the Union had not yet informed the AG's Office as to whom it had selected as the members of the bargaining team. Stagman alleges that he was removed from the bargaining team because of intervention by Ludwig. Stagman contends that when Ludwig learned of Stagman's plans to participate in the bargaining sessions, Ludwig objected because he believed Stagman would be more aggressive and diligent than Jones and create problems for management during the negotiations. According to Donald Morgan, at one time acting Director of Human Resources and who before July 1, 1995, was assigned personnel duties by Ludwig, Ludwig sent another employee to persuade the Union to remove Stagman from the bargaining team. In addition, Stagman

contends that a member of the Union board, Thomasina Jeffers, eventually told him that the "real" reason he was removed from the bargaining team was that Ludwig had demanded it. Stagman asserts that Jones colluded with Ludwig to remove Stagman from the bargaining team, pointing to the fact that Jones sent a copy of his dismissal letter to Ludwig.

In the fall of 1995, Stagman again became involved in union activities. At this time, the Union membership voted on a draft agreement between the Union and management. After the parties reached a tentative agreement, Jones posted a memorandum urging Union members to reject the contract. The AG's Office responded to the concerns raised by Jones by posting a rebuttal in which it explained its position. A few days later, Stagman authored an anonymous critique of the proposed agreement as well, which he posted on the Union bulletin board and distributed to Union members. Stagman believes his critique upset Ludwig, who allegedly told the AG's Office Chief of Staff Stephen Culliton that Stagman's analysis led to the defeat of the initial agreement. Ludwig admits that he believed Stagman had written the critical analysis. The AG's Office, however, did not respond to Stagman's analysis. Although Union members rejected this tentative agreement, they ultimately voted on and ratified a similar agreement in October. After the contract issue had been resolved, Stagman declared that he would run for president of the Union against Jones in the December election.

The third event of importance to this story occurred during the fall of 1995 as well. In the middle of October, Deputy Chief of Investigations Daniel Callahan opened an investigation examining Stagman's dealings with the Palos Heights Police Department. On behalf of one of his private clients, Stagman had called the Palos Heights Police Department to obtain a copy of a police report about an accident in which the private client had been involved. After being told no report existed, Stagman, at the very least, identified himself as being with the AG's

Office and asked to speak with a higher ranking officer. Sergeant Charles Hankus returned Stagman's call. After their conversation, Stagman went to the Palos Heights Police Department and picked up a copy of the report. The Palos Heights Police Department, then, contacted Callahan asking about a "Sergeant Stagman" who had acted in an unprofessional manner. Callahan then informed Chief of Investigations Edward Bishop and Claps, who directed him to open the investigation.

In October, Callahan questioned Stagman about the incident. Stagman admitted to stating that he was with the AG's Office, but denied having described himself as a sergeant. Upon Callahan's request, Stagman submitted a written report of the incident in which he also named two witnesses to his telephone conversations with the Palos Heights Police Department. Callahan also obtained a report from Hankus about the incident. He did not conduct any other interviews or contact the witnesses noted in Stagman's report. Callahan summarized his findings in a report in which he concluded that Stagman was guilty of impersonating an officer.

Stagman claims that during this investigation Callahan kept Ludwig informed about his progress. According to Morgan, Ludwig at one point said "Now we've got him." Callahan, however, stated that he only talked to Claps, Bishop, Stagman, and members of the Palos Heights Police Department during the investigation.

In a November meeting, Callahan reported the findings from his investigation to Culliton, Claps, Bishop, Ludwig, and Labor Counsel James Carroll. During the meeting, these individuals expressed concerns about the potential criminal nature of Stagman's actions. Some individuals recommended that Stagman be dismissed if he had identified himself as a "sergeant." Stagman alleges that Ludwig told Morgan that before Stagman could be dismissed they had to check with Ryan. Callahan does not recall anyone at the meeting mentioning the need to

report to Ryan. Ultimately, Culliton, who was unaware of Stagman's union-related activities, decided to dismiss Stagman. General Ryan did learn of the dismissal and informed Senator Carroll of it.

Ludwig sent a memorandum to Stagman on December 8, 1995, notifying him that his dismissal would be effective as of December 13, 1995. He stated six reasons for the termination of Stagman's employment: (1) interceding into a police matter for a private client; (2) using his employment with the AG's Office for the benefit of a private client; (3) invoking the name of the AG's office to benefit a private client; (4) representing himself as a "sergeant" to the Palos Heights Police Department; (5) filing a false report; and (6) failing to adhere to the AG's Office standards of professional conduct.

According to Morgan, however, Ludwig had been looking for reasons to fire Stagman for some time. Stagman had also recently been suspended for spending time away from his desk without permission. As part of the suspension, Stagman was told not to return to the building in which the AG's Office is located and where Union elections were to be held. Stagman contends that this incident, as well as others, demonstrates how Culliton and Ludwig orchestrated an attempt to build a case that they could use to dismiss Stagman.

Stagman's discharge came shortly before the Union elections in which Stagman's name was on the ballot as a candidate for president. As a result, Jones asked the other members of the Union board about whether Stagman's name should remain on the ballot. The Union board concluded it should not because Stagman was no longer eligible for the position since he no longer worked for the AG's Office. They agreed that if Stagman were reinstated, they would hold a new election for president at that time. During the same meeting, the Union board agreed to hold the elections in a different location because a space more convenient to the employees had become available.

Stagman disputes Jones's proffered reasons for the changes in the election. He claims Ludwig and Jones colluded to prevent him from running for president. He believes the Union board changed the location of the elections to make it easier for Stagman to be arrested if he attended. While Ludwig did tell Jones that Stagman would be arrested if he entered the building, both Ludwig and Jones deny any collusion with regard to these events. Ludwig explains the comments he made to Jones about arresting Stagman if he entered the building to attend the Union elections as merely informing Jones that Stagman was no longer permitted in the building because of the conduct that led to his dismissal.

Stagman challenged his dismissal in a variety of ways, including filing suit in federal district court. He raised several claims under 42 U.S.C. § 1983.[1] Only those claims related to the actions of Ryan, Claps, Ludwig, and Jones are before us. As to these defendants, Stagman asserts that they violated his First Amendment rights to free speech and assembly by preventing him from engaging in and dismissing him because of his union-related activities. The district court granted the defendants' motions for summary judgment. It found that Ryan was not personally involved in the decision to dismiss Stagman and had no knowledge of Stagman's union-related activities. As to Claps, the district court concluded that he was not aware of Stagman's protected activities. Finally, while the district court found that Ludwig was personally involved in the investigation of Stagman and knew of his union-

---

[1] Specifically, Stagman brought a § 1983 claim against the City of Palos Heights, Palos Heights Chief of Police Reed Powers, Sergeant Charles Hankus, Officer Glenn Sturtevant, and Officer John Doe, alleging they denied him his Fourteenth Amendment right to due process. The district court dismissed his claims against these defendants. He also alleged that Ryan, Claps, Ludwig, and Jones violated his due process rights, but voluntarily dismissed these claims against Ryan, Claps, and Ludwig after the district court granted Jones's Rule 12(b)(6) motion on this issue.

related activities, it concluded that Ludwig was not involved in the final decision to dismiss Stagman. Stagman appeals this decision.

II. Analysis

Stagman's challenges to the district court's decision can be grouped into three categories. First, he attacks the district court's denial of his request to take Attorney General Ryan's deposition during the discovery phase of this case. Second, he contends the district court erred in refusing to consider portions of Morgan's affidavit. Finally, he contests the district court's grant of summary judgment with regard to each Ryan, Claps, Ludwig, and Jones.

A. Attorney General Ryan's Deposition

We review district court decisions to limit discovery for abuse of discretion. *See Gile v. United Airlines, Inc.*, 95 F.3d 492, 495 (7th Cir. 1996). While discovery is often broad, the Federal Rules of Civil Procedure authorize district courts to protect targets of discovery from "annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). District courts may also direct that "the discovery may be had only by a method of discovery other than that selected by the party seeking discovery." Fed. R. Civ. P. 26(c)(3). In order to succeed with his challenge, Stagman must demonstrate one or more of the following circumstances:

> (1) the record contains no evidence upon which the court could have rationally based its decision; (2) the decision is based on an erroneous conclusion of law; (3) the decision is based on clearly erroneous factual findings; or (4) the decision clearly appears arbitrary.

Gile, 95 F.3d at 495. In addition, Stagman would have to establish that the district court's decision resulted in actual and substantial prejudice to him. *See id.*

Stagman appears to contend that the district court based its decision on clearly erroneous factual findings. He alleges that sufficient facts existed in the record to demonstrate the need for Attorney General Ryan's deposition. He asserts that Senator Carroll's and Morgan's affidavits establish that Ryan was the ultimate decision-maker with regard to his dismissal. Specifically, he references Carroll's statement that he "was approached by Attorney General James Ryan, at which time, Mr. Ryan advised the Affiant that he had been required to fire Mr. Stagman based on the information provided to him by his staff, or words to that effect." He also refers to Morgan's statements that because Stagman "was a close relative of an influential member of the General Assembly [Carroll], neither Mr. Ludwig, Mr. Stock [another AG's Office employee], nor Mr. Culliton would have fired him without James Ryan's express approval. Following standard practice, Mr. Ryan would have been advised both about the ostensible reasons for the termination and any risks involved in the decision . . . before providing approval." In addition, Morgan asserted that Culliton or another AG's Office employee "was going to advise the General about the recommendation to fire Stagman."

Stagman presented the district court only with Senator Carroll's affidavit when asking the court to require Ryan be deposed. Morgan's affidavit was not before the district court at the time Stagman asked to depose Ryan; Stagman filed it much later in response to the defendants' motions for summary judgment. We will not consider evidence that was not before the district court in making its decision, *see Smith v. Shawnee Library Sys.*, 60 F.3d 317, 324 n.7 (7th Cir. 1995), and, thus, do not consider Morgan's affidavit in our analysis here. The record contained statements of witnesses in which they indicated that Ryan was not personally involved in the decision to dismiss Stagman. The district court concluded that Carroll's affidavit did not contradict the assertion that Ryan was not personally involved in the evaluation and decision to fire

Stagman, especially in light of the statements of other witnesses who stated that others, and not Ryan, had been the decision-makers.

We agree with the district court's conclusion that nothing in Carroll's affidavit suggests a need to depose Ryan. While a generous reading of Senator Carroll's affidavit may create an inference that Attorney General Ryan, at most, approved or condoned the decision, it is clear that the decision was made by his staff. The statements of other witnesses in the record support the district court's conclusion that Ryan was not the ultimate decision-maker, and Senator Carroll's affidavit does not dispute this fact. Even if the district court had entertained Morgan's statements, they would not create a need to depose Ryan. The statements merely indicate that Morgan believed Ryan would be informed of any decision to dismiss Stagman and demonstrate Morgan's speculation as to the impact of the relationship between Carroll and Ryan on Stagman's situation. Stagman also presented no evidence that Ryan knew of his union-related activities when he asked to depose Ryan. We do not conclude that the district court abused its discretion when, considering the evidence before it at that time, it determined that deposing Ryan would serve no useful purpose. As we have noted, depositions of public officials create unique concerns. "They should not have to spend their time giving depositions in cases arising out of the performance of their official duties unless there is some reason to believe that the deposition will produce or lead to admissible evidence." *Olivieri v. Rodriguez*, 122 F.3d 406, 409-10 (7th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1040 (1998). Deposing Ryan, in the view of the district court, would have served little purpose other than to disrupt "a busy official who should not be taken away from his work to spend hours or days answering lawyers' questions." *Id.* at 409. Therefore, the district court did not abuse its discretion in limiting Stagman's discovery by refusing to require the Attorney General of Illinois to be deposed.

B. Morgan's Affidavit

Before considering the merits of Stagman's claims, we turn first to his assertions that the district court improperly excluded statements from Morgan's affidavit upon which he heavily relies to support his claims. Throughout his appeal, Stagman refers to statements in Morgan's affidavit to buttress his arguments. With regard to Morgan's statements, the district court concluded that his affidavit constituted "an amalgam of hearsay, speculation, and scant foundation for conclusory allegations—precisely the objections which would render the statements contained in this affidavit inadmissible at trial." After reviewing the district court's decision for abuse of discretion, *see United States v. Flores*, 5 F.3d 1070, 1080 (7th Cir. 1993) (stating that we review district court evidentiary rulings for abuse of discretion), we conclude that the district court's decision is substantially correct.

In opposition to the defendants' motions for summary judgment, Stagman cannot rely upon statements in Morgan's affidavit that fail to meet the requirements set forth in Federal Rule of Civil Procedure 56(e). Specifically, Rule 56(e) states that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Thus, statements outside the affiant's personal knowledge or statements that are the result of speculation or conjecture or merely conclusory do not meet this requirement. *See Box v. A & P Tea Co.*, 772 F.2d 1372, 1378 (7th Cir. 1985).

Stagman seeds his arguments with a variety of statements from Morgan's affidavit. He references Morgan's statements to provide support for primarily three contentions:[2] (1) Ryan participated in the decision to dismiss

---

[2] Stagman also refers to several statements within Morgan's affidavit for which he offers no arguments as to why we should con-

(continued...)

Stagman; (2) Ludwig knew Stagman was on the bargaining team and was involved in the decision to discharge Stagman; and (3) Jones was a state actor because he colluded with Ludwig to discharge Stagman. All but one of the statements upon which Stagman relies to support these contentions, however, fail to meet the requirements of Rule 56(e).

Stagman turns to Morgan's affidavit for support of his contention that Ryan was involved with the decision to terminate him for allegedly impermissible reasons. He points to two of Morgan's statements in this regard. First, Morgan stated that Ludwig or Culliton would not have dismissed Stagman without Ryan's "express approval" because Stagman was a "close relative of an influential member of the General Assembly." Stagman contends that this statement should be admissible as opinion testimony by a lay witness. Under the Federal Rules of Evidence, a witness who is not an expert may testify about opinions or inferences formed that are based on the witness's perception and "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Fed. R. Evid. 701. As the advisory comments explain, the requirement that the opinion be based on the witness's perception is "the familiar requirement of first-hand knowledge or observation." Fed. R. Evid. 701(a) advisory committee's note. Specifically, Morgan's affidavit reads:

> Because Sander Stagman was a close relative of an influential member of the General Assembly, neither Mr. Ludwig, Mr. Stock, nor Mr. Culliton would have fired him without James Ryan's express approval. Following standard practice, Mr. Ryan would have been

---

[2] (...continued)
sider these statements when the district court found them inadmissible. We will not make these arguments for him and, thus, consider only the statements for which he presents legal arguments challenging the district court's conclusions.

> advised both about the ostensible reasons for the termination and any risks involved in the decision, such as the pending Local Union election and Mr. Stagman's candidacy, before providing such approval.

Stagman has not demonstrated that Morgan had personal knowledge of the facts asserted in his statement. Thus, Morgan's statement does not meet the first requirement of Rule 701. It is mere speculation and, as such, a meaningless assertion. "[U]ltimately, the question of whether a lay opinion falls into the category of 'meaningless assertion' or whether that opinion actually will help the jury decide an issue in the case is a judgment call for the district court." *United States v. Allen*, 10 F.3d 405, 415 (7th Cir. 1993). Thus, the district court did not abuse its discretion by refusing to consider these statements.

Second, Morgan stated that Ludwig told him that Ryan would be advised before Stagman was fired. Stagman contends that this statement constitutes a party admission under Rule 801(d)(2). Although Stagman does not specify under which subsection(s) of Rule 801(d)(2) this statement should be admitted, we believe only two possibilities exist. Under this rule, a "statement [that] is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity . . . or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship . . ." is admissible. Fed. R. Evid. 801(d)(2)(A), (D). Stagman does not offer this statement against Ludwig, so we must determine whether it would be admissible against Ryan because Ludwig is a representative of Ryan. To establish that the statement comes within the scope of Rule 801(d)(2)(A), Stagman must present independent evidence that Ludwig was Ryan's representative. *Cf. United States v. Dalzotto*, 603 F.2d 642, 644 (7th Cir. 1979) (stating that in order to come within Rule 801(d)(2)(A) a statement made by a defendant to another person, who testified to it, constituted hearsay against the third party named in

the statement unless independent evidence established the third party's involvement in the conspiracy as well). The problem is that while the record is clear that Ludwig is an employee of the AG's Office of which Ryan is the head, Stagman presents no evidence that Ryan designated Ludwig as his representative. Therefore, the statement is not admissible under this subsection.

Under Rule 801(d)(2)(D), however, we believe the statement would be admissible. In considering whether statements are admissible under this rule, we must determine if the employee was authorized by his employer regarding the matter about which he allegedly spoke. *See Wilkinson v. Carnival Cruise Lines, Inc.*, 920 F.2d 1560, 1565-66 (11th Cir. 1991). First, Ludwig is employed by Ryan's office. Second, the statement concerns the dismissal of another employee of the AG's Office. Even if Ludwig was not the final decision-maker, Stagman's discharge was within the scope of Ludwig's employment as evidenced by the fact that he suggested disciplining Stagman for the Palos Heights incident and authored the memorandum notifying Stagman of the discharge. Finally, Ludwig made the statement while employed with the AG's office. We also note that the comments of Rule 801(d)(2) do not require first-hand knowledge for this exception to the hearsay rule. *See* Fed. R. Evid. 801(d)(2) advisory committee's note; *see also Williams v. Pharmacia, Inc.*, 137 F.3d 944, 950 (7th Cir. 1998). Thus, Ludwig's statement to Morgan that they must "advise" Ryan about the recommendation to fire Stagman would be admissible.

With regard to his claims against Ludwig, Stagman relies on Morgan's affidavit to support his contention that Ludwig knew of Stagman's participation on the bargaining team and Ludwig's involvement in the decision to discharge Stagman. These statements also fail to meet the requirements of Rule 56(e). Morgan states in his affidavit that "Mr. Ludwig learned that Sander Stagman was going to be a member of IFT Local 4747's collective bargaining team." Morgan, however, does not demonstrate personal

knowledge of this information. It is mere speculation; no evidence describes how Morgan would have known about this fact. His affidavit also contains a statement that Ludwig considered Stagman to be "more aggressive and diligent" than Jones and, therefore, objected to his presence on the bargaining team. This statement also lacks the personal knowledge foundation and expresses conjecture as to Ludwig's feelings about Stagman's presence on the team.

Morgan also asserts in his affidavit that Ludwig told the AG's Office Bureau Chief in the Office of Administrative Services Norma Medina to discuss removing Stagman from the bargaining team with Jones and Union officials and that Medina told Morgan afterwards that the union had agreed to remove Stagman. This statement is based on inadmissible hearsay as well. Neither Morgan nor Stagman explains how Morgan knew that Ludwig had dispatched Medina for this "job." Thus, this aspect of the statement is mere conjecture. Even if we assume that Medina told Morgan this initial information as well, it constitutes hearsay within hearsay and is inadmissible unless each part of the statement falls within an exception to the general ban on admitting hearsay evidence. *See* Fed. R. Evid. 805. Contrary to Stagman's arguments, the statements would not be admissible under the party admissions exception to the hearsay rule under Fed. R. Evid. 801(d)(2)(D) and (E).

For Morgan's statement regarding Ludwig's involvement in Stagman's removal from the bargaining team to be admissible under Rule 801(d)(2)(D), he must demonstrate that the statement is being offered against Ludwig and that an agent or servant of Ludwig made the statement concerning a matter within the scope of and during the course of that relationship. *See Williams*, 137 F.3d at 950. Stagman does not present evidence demonstrating that removing Stagman from the bargaining team was within the scope of Medina's employment with the AG's Office. No evidence in the record indicates that the scope of

Medina's job-related duties extended to the Union or the management's negotiation efforts with the Union. As we noted in *Williams*, "not everything that relates to one's job falls within the scope of one's agency or employment." *Id.* Persuading the Union which members to place on its bargaining team does not obviously fall within the job of the Bureau Chief in the Office of Administrative Services, Medina's position. The rules of evidence require Stagman to present factual support that Medina was an employee of Ludwig and that the statement concerned a matter within her employment. He, however, has pointed to no evidence to create this necessary foundation. Thus, we find no reason to disagree with the district court's assessment of this statement.

For Morgan's statement that Medina told him the Union removed Stagman from the bargaining team according to her request to be admissible as that of a coconspirator, Stagman would have to establish: (1) the existence of a conspiracy; (2) that the person making the statement was involved in the conspiracy; and (3) that the statement was made "during the course and furtherance of the conspiracy." *See, e.g., Garlington v. O'Leary*, 879 F.2d 277, 280 (7th Cir. 1989). Stagman has not presented evidence of the conspiracy or that any Union board member participated in it. Nor does he present evidence demonstrating that the statement was made in furtherance of the conspiracy. As Rule 801(d)(2) states: "The contents of the statement shall be considered but are not alone sufficient to establish . . . the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E)." Because Stagman does not establish an adequate foundation for the admissibility of this statement, we cannot consider it. The same analysis applies to the unattributed statement that Ludwig dispatched Medina to discuss removing Stagman from the bargaining team with the Union. Stagman also does not establish the existence of a conspiracy with regard to this statement. Therefore, it too is inadmissible.

Finally, the district court also properly excluded from its consideration the statements that Stagman cites as evidence that Jones was a state actor because he colluded with Ludwig to remove Stagman from the bargaining team. To establish this collusion, Stagman relies on Morgan's statement that Ludwig dispatched Medina to persuade Union officials to remove Stagman from the bargaining team, as well as his comment that Medina told him the Union had agreed to the removal. As we have determined, it is clear that these statements constitute conjecture and hearsay and, therefore, were properly ignored by the district court.

Taken as a whole, Morgan's affidavit presents few facts that the district court could consider in light of Rule 56(e). Therefore, we find no reason to overturn the district court's evidentiary conclusions, with one exception, and consider these statements in our review of its grant of summary judgment.

C. Summary Judgment

The district court granted summary judgment in favor of Ryan, Claps, Ludwig, and Jones with regard to Stagman's § 1983 claim. As to Ryan, Claps, and Ludwig, the court found that Stagman had failed to present evidence establishing that they either were personally involved in the decision to discharge Stagman or had knowledge of Stagman's union activities. With respect to Jones, the district court also concluded that Stagman failed to establish a causal link between Stagman's union-related activities and Jones's alleged retaliation and, in the alternative, that Stagman had not established that Jones was a joint actor with the state actors. We agree with the district court's conclusions.

We review grants of summary judgment *de novo*. *See Tesch v. County of Green Lake*, 157 F.3d 465, 471 (7th Cir. 1998). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In determining whether a genuine issue of material fact exists, we construe all facts in the light most favorable to the nonmoving party and draw all reasonable and justifiable inferences in that party's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, neither "the mere existence of some alleged factual dispute between the parties," *Anderson*, 477 U.S. at 247, nor the existence of "some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), is sufficient to defeat such a motion.

Stagman claims that Ryan, Claps, Ludwig, and Jones impermissibly discharged him for exercising his First Amendment rights of free speech and assembly, alleging they are, thus, liable under § 1983. Under § 1983, government officials, while acting under the color of state law, who deprive individuals of their constitutionally protected rights, are personally liable for damages. *See* 42 U.S.C. § 1983. Thus, to establish a claim under this statute, a plaintiff must demonstrate that defendants violated a constitutional right and that this violation occurred under the color of state law. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970). The Supreme Court clarified that plaintiffs alleging First Amendment retaliatory claims must show that the speech or conduct[3] engaged in was constitutionally protected and that this speech or conduct was the substantial or motivating factor in the employer's decision to terminate. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Conner v. Reinhard*, 847 F.2d 384, 393 (7th Cir. 1988). If

---

[3] We evaluate free speech and free assembly claims under the same analysis. *See Gregorich v. Lund*, 54 F.3d 410, 414 n.4 (7th Cir. 1995).

the plaintiff establishes these two points, the burden shifts to the defendant to establish that it would have dismissed the plaintiff even if the protected conduct had not occurred. *See Conner*, 847 F.2d at 393. "[A] plaintiff cannot prevail in her claim of retaliatory discharge if the defendant can show that the decision to terminate the plaintiff would have been reasonable even in the absence of the protected conduct." *Id.*

Defendants admit that Stagman engaged in constitutionally protected activities under the First Amendment when he participated in Union activities, such as critiquing the proposed bargaining agreement and running for office in the Union. We, like the district court, see no need to consider whether his activities actually constituted protected speech or conduct under *Connick v. Myers*, 461 U.S. 138 (1983), and merely assume they do for purposes of this appeal.[4]

Stagman, however, challenges the district court's determination that he has not established issues of material fact with regard to whether Defendants retaliated against him because of his speech and conduct. In order to establish that a defendant retaliated against a plaintiff because of a protected constitutional right, a plaintiff must demonstrate that the defendant knew of the retaliation and knew of the plaintiff's constitutional activities. *See Vance v. Peters*, 97 F.3d 987, 993 (7th Cir. 1996), *cert. denied*, 520 U.S. 1230 (1997); *O'Connor v. Chicago Transit Auth.*, 985 F.2d 1362, 1369-70 (7th Cir. 1993). Stagman contends that the record contains issues of material fact,

---

[4] While some union activities constitute protected speech and/or conduct, "[i]t does not follow . . . that all activities of a union or its members are constitutionally protected." *Hanover Twp. Fed. of Teachers Local 1954 (AFL-CIO) v. Hanover Comm. Sch. Corp.*, 457 F.2d 456, 460 (7th Cir. 1972). Thus, we refrain from concluding definitively whether Stagman's specific union-related activities come within the protection of the U.S. Constitution for purposes of his § 1983 claims.

so we turn to consider his arguments with regard to each Defendant.

1. Attorney General James Ryan

Stagman contends that the district court erred in granting summary judgment to Ryan based on its determination that Ryan did not terminate Stagman's position and had no knowledge of Stagman's union-related activities. To establish his claim against Ryan, Stagman must demonstrate that Ryan "kn[ew] about the conduct and facilitate[d] it, approve[d] it, condone[d] it, or turn[ed] a blind eye." *Vance*, 97 F.3d at 993 (quoting *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995)) (internal citations omitted). In other words, Stagman must demonstrate a connection between his dismissal for retaliatory reasons and Ryan. In addition, Stagman must establish that Ryan knew of his union-related activities. "Allegedly protected speech cannot be proven to motivate retaliation, if there is no evidence that the defendants knew of the protected speech." *O'Connor*, 985 F.2d at 1370. We agree with the district court that Stagman has not presented issues of material fact to establish a case against Ryan.

First, Stagman has not created an issue of material fact demonstrating a connection between the termination of his employment for retaliatory reasons and Attorney General Ryan. Stagman's reliance on Senator Carroll's statement does not reinforce his position. Arguing that the district court improperly ignored statements in Morgan's affidavit, Stagman bases his contentions upon statements from Morgan's and Senator Carroll's affidavits and a belief that the court should have made the "reasonable" inference that because Ryan involved himself in Stagman's vacation problems, he would also have participated in the decision to discharge Stagman. Because only one of the statements from Morgan's affidavit that Stagman uses to buttress his claims would be admissible, we consider only that statement along with the statement made by Senator Carroll.

A generous reading of Senator Carroll's affidavit supports Stagman's contention that Ryan approved Stagman's dismissal. Senator Carroll's affidavit states: "In January 1996, Affiant was approached by Attorney General James Ryan, at which time, Mr. Ryan advised the Affiant that he had been required to fire Mr. Stagman based on the information provided to him by his staff, or words to that effect." In his own affidavit, Ryan recalls the exchange, stating: "I had a conversation with Senator Howard W. Carroll early in 1996, after Sander Stagman was terminated. I mentioned that my staff informed me of Sander Stagman's termination due [to] his misconduct. However, at no time during this conversation did I tell Senator Carroll that I participated in the decision to terminate Sander Stagman." Ryan's affidavit also states that he was not involved in the investigation of Stagman, the review of documents relating to the discharge, or the decision to discharge Stagman. Morgan's affidavit statement that Ludwig told him that before Stagman was discharged, Ryan would be advised also supports the allegation that Ryan would have been aware of the decision to discharge Stagman. The problem for Stagman, however, is not whether Ryan knew of or approved the decision to dismiss him, but rather whether he was part of the decision to dismiss Stagman for *retaliatory reasons*. Because neither Carroll's nor Morgan's affidavit supports this contention, we agree that the district court properly concluded that Stagman had not established the necessary link between Ryan and the alleged decision to terminate Stagman in retaliation for his union-related activities.

In addition, Stagman has not established that Ryan knew of Stagman's union-related activities. Ryan avers that he did not know that Stagman was part of the bargaining team, he authored a negative critique of the proposed bargaining agreement, or he was running for Union president. Stagman admits that he never told management that he was part of the team, and the May letter from Jones, which he copied to Ludwig, not Ryan, clearly

indicates Stagman was not part of the team. While Stagman alleges Ludwig knew he had authored the critique, he does not claim Ryan did. He similarly fails to show Ryan knew he was running for president. Rather, Stagman asks this Court to infer that Ludwig, who supposedly talked with Morgan openly, would have shared this information with others, including Ryan, the Attorney General. This inference is beyond reason. We, thus, conclude that Stagman has not put forth any evidence demonstrating that Ryan knew of his union-related activities. Because Stagman has failed to establish a material issue of fact as to this point, as well as a connection between the alleged retaliatory conduct and Ryan, the district court correctly granted summary judgment to Ryan.

2. Joseph Claps

Similarly, Stagman claims the district court erred in entering summary judgment for Claps after it concluded that he, like Ryan, did not know of Stagman's expressive and associational conduct. Stagman offers two reason to support his contention that Claps knew of his union-related activities. First, he speculates that the timing of his discharge raises suspicion. He was discharged just days before the Union election. We have stated that "[s]uspicious timing does constitute circumstantial, or indirect, evidence to support a claim" in the context of discrimination suits. *Hunt-Golliday v. Metropolitan Water Reclamation Dist. of Greater Chicago*, 104 F.3d 1004, 1011 (7th Cir. 1997). Stagman presents no evidence, other than his own assertion, to show any connection between the timing of his dismissal and his union-related activities. Speculation of suspicious timing alone is not enough to create a reasonable inference of knowledge. *See id.* Second, he alleges that because Claps's subordinates did not interview all potential witnesses with regard to the Palos Heights incident, we should infer some sort of knowledge of Stagman's union-related activities because the Palos Heights incident, supposedly, was manufactured as a rea-

son for his dismissal. This assertion is absurd in light of the fact that Stagman admitted to using his position as an employee of the AG's Office to help a private client. He also fails to assert that Claps told the subordinate how to conduct the investigation; no evidence indicates that such direction ever occurred. The evidence in the record about Claps indicates that he did not know of Stagman's union-related activities. While Claps does rely upon his affidavit, Stagman fails to present any evidence, other than mere speculation and conjecture, to discredit Claps's averments. Thus, Stagman does not meet his burden of showing that Claps knew of his protected activities. If he did not know about them, it is impossible to conclude that Claps's decision to fire him was motivated by an illegitimate desire to prohibit Stagman from exercising them. Therefore, we believe the district court correctly granted summary judgment to Claps.

3. Edward Ludwig

Stagman also takes issue with the district court's grant of summary judgment to Ludwig after it determined that he was not responsible for the decision to terminate Stagman's employment with the AG's Office. As with the other defendants, Stagman must demonstrate that Ludwig knew Stagman engaged in expression and/or conduct that was constitutionally protected in the circumstances and retaliated against him because of those activities. *See Caldwell v. City of Elwood*, 959 F.2d 670, 672 (7th Cir. 1992). If he establishes this connection, he must demonstrate that his expression or conduct was the "substantial or motivating factor in the decision to terminate" him. *Connor*, 847 F.2d at 393. As we have noted in similar cases, "a plaintiff may not sustain her burden 'simply by showing that the elimination of the protected activity may have been welcomed by the defendants,' nor can we typically draw strong conclusions from the mere fact that protected speech may have preceded an adverse employment decision." *Wright v. Illinois Dept. of Children & Family Servs.*, 40 F.3d

1492, 1500 (7th Cir. 1994) (citations omitted). Stagman simply fails to meet his burden.

Stagman attacks the district court's opinion in three ways. First, he asserts that the district court ignored that Ludwig's retaliatory actions consisted of three things—(1) seeking to dismiss him from the bargaining team; (2) suspending him for leaving his workstation without permission; and (3) ultimately, dismissing him. Second, he claims that evidence in the record establishes that Ludwig actively participated in the decision to dismiss him for retaliatory reasons by participating in a series of meetings on the subject during which Ludwig searched for a way to dismiss him. Finally, Stagman claims that the district court acted as a super-personnel department and concluded, contrary to the conclusions reached by the actual decision-makers, that Stagman's use of the AG's Office's clout to benefit a private client showed that his protected expression or conduct was not the substantial or motivating factor in his dismissal.

Stagman's contention that Ludwig engaged in a series of retaliatory events against him does not win our support. His claim that Ludwig's retaliatory animus toward him led to his dismissal from the bargaining team is based solely on speculation. To establish this claim, he relies on statements in Morgan's affidavit that Ludwig dispatched Medina to get Stagman off the bargaining team. We, like the district court, find that the record does not demonstrate Morgan had personal knowledge of these events, nor does it contain anything that would elevate these statements above speculation or conjecture. Other evidence in the record indicates that at the earliest, Ludwig would have learned of Stagman's status with regard to the bargaining team in May in a letter that expressly stated Stagman was not a member. Stagman also presents no admissible evidence of any collusive action between Ludwig and Jones suggesting they conspired to keep him off the team. Nor is there any evidence to indicate that Ludwig knew of Stagman's alleged posi-

tion on this team. Thus, Stagman does not establish that Ludwig knew of Stagman's potentially protected activity, making it difficult for him to have retaliated against Stagman by prohibiting him from engaging in it.

Similarly, Stagman seeks to bolster his claim that his suspension was timed to prevent him from attending the Union elections with Morgan's affidavit. While the timing issue is one we consider, on its own, it constitutes nothing more than mere speculation. No evidence in the record, outside of Morgan's affidavit, which we and the district court found insufficient, creates a material issue of fact. Stagman, thus, did not establish that the suspension was a retaliatory action aimed at preventing him from participating in the Union elections.

Stagman's claim that his dismissal constitutes a retaliatory action overlaps with his assertion that Ludwig participated in the decision, so we consider them together. While it is true that the record demonstrates the existence of an issue of fact as to the number of meetings that occurred with regard to the AG's Office investigation of Stagman for the Palos Heights incident, the record clearly establishes that Culliton made the final decision. Although he may have based it upon the reports and recommendations of others, the final decision cannot be attributed to these individuals or Ludwig specifically. In fact, both parties agree that Ludwig had recommended suspension, not dismissal, for Stagman's activities. The evidence upon which Stagman relies again comes from statements in Morgan's affidavits we cannot consider because they constitute unsupported speculation. Thus, Stagman fails to present evidence of an issue of material fact as to whether Ludwig was personally responsible for the decision to dismiss him for retaliatory reasons.

We will go one step further and agree with the district court that even if Stagman had established that Ludwig was personally involved in the final decision to terminate Stagman's employment, his claim still would fail to survive Ludwig's motion for summary judgment. The letter

notifying Ludwig of his dismissal stated that he was discharged for his actions in connection with the Palos Heights Police Department. Courts do not sit as "super-personnel department[s]," *see Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986). Our role is not to second-guess the employer's decision, but to determine whether the employer's substantial or motivating factor in terminating employment was the plaintiff's protected conduct. The record clearly supports the district court's conclusion that the decision to terminate Stagman was based on his conduct as it related to his use of the AG's Office's clout, not as it related to his union activities. While Ludwig and others may have suggested lesser punishment for Stagman, the record establishes that all agreed Stagman had committed a serious offense. The record indicates that Culliton was the undisputed ultimate decision-maker and based his decision solely on Stagman's use of the AG's Office to benefit a private client, not on his union-related activities of which Culliton knew nothing. Thus, we do not find the district court's conclusion that Stagman would have been fired regardless of his protected conduct or the attitude of his supervisors toward his activities inappropriate. Stagman simply fails to present evidence that "but for" his protected activities he would not have been discharged. Therefore, we find the district court did not err in entering summary judgment for Ludwig.

4. Richard Jones

In Stagman's final challenge to the district court's decision, he contends the district court erred in concluding that Stagman had not established that Jones acted with Ludwig so as to make him a state actor and, therefore, liable under § 1983. We agree with the district court's conclusion that Stagman did not present evidence demonstrating Jones acted under the color of state law for § 1983 purposes.

In order to establish a § 1983 claim against Jones, Stagman must show that in addition to the fact that his constitutional right was violated, the violation occurred *under state law*. *See Adickes*, 398 U.S. at 150; *see also Moore v. Marketplace Restaurant*, 754 F.2d 1336, 1352 (7th Cir. 1985). The Supreme Court has explained:

> [T]o act "under the color of" state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting . . . "under color" of law for purposes of § 1983 actions.

Dennis v. Sparks, 449 U.S. 24, 27-28 (1980); *see also Leahy v. Board of Trustees of Community College Dist. No. 508*, 912 F.2d 917, 921 (7th Cir. 1990). We have held that to establish joint action, a plaintiff must demonstrate that the public and private actors shared a common, unconstitutional goal. *See Cunningham v. Southlake Ctr. for Mental Health, Inc.*, 924 F.2d 106, 107 (7th Cir. 1991). In other words, a plaintiff must establish that a conspiracy, or an understanding, to violate the plaintiff's constitutional rights existed between the public and private actors. *See Moore*, 754 F.2d at 1352.

Although Stagman provides few specifics in his brief, it appears from the record that he relies upon statements in his own affidavit and in Morgan's affidavit as evidence of the existence of an agreement between Jones and Ludwig. He points to statements in his affidavit in which he states that another Union board member told him the real reason for his removal from the bargaining team was because Ludwig wanted him off of it. As we have concluded, this statement is based on hearsay and does not come within the party admission exception. As such, we cannot consider it when determining whether he established joint action between Jones and Ludwig. Stagman also cites to Morgan's affidavit to establish the link between Jones and

Ludwig. Because these statements also constitute inadmissible hearsay, we refrain from introducing them into our analysis.

No other evidence exists in the record demonstrating a connection between Jones and Ludwig. The record does contain, however, statements from both Jones and Ludwig denying any such agreement existed. Without other evidence, Stagman's conclusory allegations are insufficient to create a material issue of fact. "[A] bare allegation of a conspiracy between private and state entities is insufficient to bring the private entity within the scope of § 1983." *Messman v. Helmke*, 133 F.3d 1042, 1045 (7th Cir. 1998). Thus, we find no reason to reach a conclusion differing from that of the district court.

In sum, Stagman's challenge to the district court's grant of summary judgment to Ryan, Claps, Ludwig, and Jones fails because it does not present evidence establishing the defendants knew of his protected activities, were the decision-makers in his dismissal, or acted in concert with the state actors to violate his constitutional rights.

III. Conclusion

Stagman's arguments challenging the district court's conclusions do not persuade us to alter its decision. First, the district court did not abuse its discretion in concluding that Stagman had not established a need to depose Ryan. Second, the district court's evidentiary rulings regarding Morgan's affidavit also do not demonstrate an abuse of discretion. Finally, based on the record, Stagman failed to present issues of material fact that would make the district court's grant of summary judgment inappropriate. We, like the district court, conclude that summary judgment in favor of the defendants is appropriate. Thus, we AFFIRM the decision.

APPENDIX B

[Dated March 24, 1998]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SANDER STAGMAN, Plaintiff, vs. JAMES RYAN, JOSEPH CLAPS, EDWARD LUDWIG and RICHARD JONES, Defendants.	)	96 C 8012

MEMORANDUM OPINION AND ORDER

CHARLES P. KOCORAS, District Judge:

This matter is before the Court on two separate motions for summary judgment—one filed by Defendant Jones, the other filed by the State Defendants Ryan, Claps, and Ludwig. For the following reasons, both motions for summary judgment are granted.

BACKGROUND

Plaintiff Sander Stagman ("Stagman") was employed by the Office of the Illinois Attorney General ("the Office") from April 1987 until December 9, 1995. Since 1992, Stagman was employed in the Office as an accoun-

tant. During his employment with the Office, Stagman concurrently ran a private accounting business with the knowledge and approval of the Office.

Defendant Richard Jones ("Jones") was employed in the Office as a programmer, analyst and accountant. Jones was also the President of the Illinois Federation of Teachers Local 4747 AFT/AFL-CIO ("the Union")—the certified collective bargaining representative unit of technical and professional employees in the Office. Defendant James Ryan ("Ryan") was and is the Attorney General of the State of Illinois. Defendant Joseph Claps ("Claps") was the Chief of the Department of Public Safety in the Office. Defendant Edward Ludwig ("Ludwig") was the Chief of the Department of Administration of the Office. Defendants Ryan, Claps, and Ludwig will be referred to as "the State Defendants" in this opinion.

In April 1995, Stagman was recommended by Jones to become a union steward, and the Union Executive Board subsequently appointed Jones to the position. As required by the parties' collective bargaining agreement, Jones gave notice of the appointment to management by memo on April 9, 1995. Stagman was allegedly made a member of the Union's bargaining team at this time, but the team never engaged in bargaining with management during the time Stagman was a member.

After Stagman became a union steward, Jones received several complaints from other officers and stewards of the Union about Stagman's conduct in representing certain bargaining unit members in grievances. These union members contended that Stagman interfered in grievances which were assigned to other stewards, mishandled grievances for which he was responsible, and ex-

ceeded his authority in his dealings with bargaining unit members and with employer representatives in the grievance process. Stagman's conduct was the subject of at least one union meeting, and it became a source of disruption for the regular business of these meetings. On May 26, 1995, the Union's Executive Board discussed Stagman's alleged misconduct and ultimately decided to remove Stagman from his positions as a union steward and as a member of the Union's bargaining team. Jones advised Stagman of this decision by a letter dated May 26, 1995, a letter which also was copied to Office management personnel including Ludwig. Prior to this letter, there had been no public acknowledgment that Stagman was a member of the bargaining unit, nor had Stagman engaged in any bargaining activity.

Disputing the reasons proffered by Jones in support of Stagman's removal, Stagman contends that he was removed at the request of Ludwig. According to Donald Morgan, who assisted Ludwig with his duties and later was named Acting Director of Human Resources at the office, Ludwig learned that Stagman was going to be a member of the bargaining team. Morgan claims that Ludwig did not want Stagman to be a bargaining team member because he perceived Stagman as too aggressive and diligent. According to Morgan, Ludwig dispatched Norma Medina, who was the Bureau Chief in the office of Administrative Services, to discuss removing Stagman from the bargaining team with Jones. According to Morgan, Medina allegedly met with Jones and other Union officers, including Arlene Maryanski, Nilda Iris Delgado, and Thomasina Jeffers, and then met again with Jones alone. Jones denies ever having had a conversation with

Medina, Ludwig, or any other member of the Human Relations Department, concerning Stagman's service as a union steward or member of the bargaining team. After these meetings, Medina apparently informed Morgan that the Union had agreed to remove Stagman from the bargaining team. Though Morgan has averred these facts in his affidavit, he provides very little detail as to when and how he became privy to this information.

The union and the Office were parties to a collective bargaining agreement which expired in June 1995. In July 1995, those parties began collective bargaining negotiations for the successor to that agreement. The Union did not identify members of its bargaining team to management until early July 1995, and Ludwig's only knowledge that Stagman had ever been a member of the team was from the May 26, 1995 letter. The Union and the Office reached a tentative agreement in August 1995 which was submitted to the union members for a vote. On August 14, 1995, Jones posted a memorandum on the Union's bulletin boards in the Office regarding the proposed collective bargaining agreement. In his memo, Jones stated that he did not agree with management on the issues in the proposed contract, and that therefore he recommended against the ratification of the proposed agreement.

On August 16, 1995, the management of the Office posted a rebuttal to Jones' August 14 memo explaining management's position. On August 19, 1995, Stagman authored an "analysis" of the proposed collective bargaining agreement between the Office and the Union. Stagman's analysis, which was 7 pages in length, was also posted on the Union bulletin board. Stagman did not

sign the analysis, but Ludwig admits that he was under the impression that Stagman had authored it. Ludwig thought that Stagman's analysis distorted and misrepresented the elements of the proposed agreement. Management did not respond to or post a rebuttal to Stagman's unsigned analysis. The members of the Union ultimately voted to reject the tentative agreement. However, on October 25, 1995, the Union voted on and ratified an agreement which was not significantly different than the one rejected in August.

Concurrent with working at the Office, Stagman continued to maintain his outside business of assisting private accounting clients. An incident involving one of these clients is alleged to have led to Stagman's dismissal from the Office. This client, Ruth Fritsch, was involved in an automobile accident on August 11, 1995. Fritsch contacted Stagman the next day and asked him to investigate the incident for her. Stagman offered to go to Fritsch's house and call the Palos Heights Police Department to obtain a copy of the accident report. Stagman did in fact go to Fritsch's home and made the call. Stagman was first informed that there was no police report, and that he could not speak to a commanding officer. Stagman then stated, "My name is Sander Stagman. I'm with the Attorney General's Office." Immediately after identifying himself as with the Office, Stagman states that he was afforded more respect.

Stagman quickly received a return phone call from Sergeant Charles Hankus of the Palos Heights Police Department. After being informed by Stagman that he would report the missing police report to the Attorney General's office, Hankus found the report. Stagman sub-

sequently went to the Palos Heights Police Department to get a copy of the report, and Hankus gave him the report and went over it with him. According to Hankus, Stagman had identified himself as a "sergeant" with the Attorney General's Office in both the phone call and during his visit to the police station. Hankus later informed Deputy Chief of Investigations Daniel Callahan of the Attorney General's Office, which was followed up by a letter to him dated October 25, 1995, stating that Stagman had tried to improperly exert influence over him based on his position with the office.

On October 16, 1995, Callahan questioned Stagman about the August 12 Palos Heights incident. Stagman freely admitted that he had identified himself as an employee of the Office, but denied stating that he was a sergeant or in the investigations division. Stagman suggested that the Palos Heights officer may have confused "Sander" with "Sergeant". Callahan asked Stagman to prepare a memorandum about the incident, which Stagman provided to Callahan on November 7, 1995. In this memorandum, Stagman identified two witnesses to his August 12 telephone conversations with the Palos Heights Police Department—Ruth and Donna Fritsch.

After reviewing Hankus' letter and Stagman's written memorandum, Callahan then prepared a report of the incident. Callahan did not contact Stagman's witnesses to determine what Stagman had said over the phone. Callahan also chose not to interview Hankus or any other possible witnesses at the Palos Heights Police Department, nor did he inquire about the existence of any audio tapes of Stagman's telephone calls. On November 15, 1995, Callahan submitted his report to Ed Bishop, then

Chief of Investigations in the Office, and Defendant Joseph Claps. The material from Callahan's report was later provided to Ludwig.

According to Donald Morgan, Ludwig had been kept apprised by Callahan of the ongoing investigation into Stagman's August 12 incident.. Upon first learning of the incident, Ludwig allegedly exclaimed "Now we've got him." After receiving the material from Callahan, Ludwig prepared charges against Stagman for the Palos Heights incident. Ludwig originally sought a 10-day suspension, but later sought a 20-day suspension after including an additional charge. In early December, a meeting was held regarding Stagman's August 12 incident. Those present at the meeting, including Stephen Culliton, the chief of staff for the Attorney General, expressed serious concern that Stagman's actions may have been criminal. Others present at the meeting—including Labor Counsel James Carroll, Claps, Ludwig, Callahan and Bishop—all recommended that Stagman be dismissed. This recommendation for dismissal, however, was premised on the assumption that Stagman had in fact identified himself as a "sergeant". At the meeting, it was determined that Stagman should be discharged.

The reasons listed for Stagman's discharge included that (1) he interceded in a police matter on behalf of a private client; (2) he introduced into his conversation with the Palos Heights Police Department the fact that he was employed by the Attorney General's Office for the benefit of his client and friend; (3) he invoked the name of the Attorney General's Office so that he or his client could realize personal gain; (4) he represented to the Palos Heights Police Department that he was a sergeant

with the Investigations Unit of the Attorney General's Office; and (5) he filed a false report.

Stagman was discharged on December 8, 1995, with his dismissal to be effective on December 13, 1995. Culliton was the ultimate decision maker in the decision to terminate Stagman. Culliton was not aware that Stagman had been a union steward or a member of the Union bargaining team, nor did Culliton know that Stagman had prepared the "analysis". Furthermore, Culliton was not aware that the union election was scheduled for later in December or that Stagman was running for union president.

The final issue of dispute concerns the alleged suspension of Stagman before the Union election on December 12, 1995. Apparently, Stagman had been spending too much time away from his desk, and he was thus suspended from work for December 11 and 12, 1995. Ludwig informed Jones that Stagman had been suspended and was going to be fired. Jones, Maryanski, Jeffers and Delgado (the union officers) all agreed to remove Stagman's name from the ballot for the election the next day. Ludwig and Jones discussed the idea of moving the union election to another floor in the building so as to avert any potential problems, agreeing that it should be moved. Ludwig informed Jones that he planned on having Stagman arrested if he attempted to disrupt the union elections.

Stagman has since brought this two-count Second Amended Complaint. Count I asserts a § 1983 claim against the City of Palos Heights, Palos Heights Chief of Police Reed Powers, Sergeant Charles Hankus, Officer Glenn Sturtevant, and Officer John Doe for depriving

Stagman his right to due process under the 14th Amendment. Count II, which is the subject of the pending motions, asserts a § 1983 claim against Defendants James Ryan, Joseph Claps, Edward Ludwig, and Richard Jones for violating Stagman's right to free speech under the First Amendment. Defendant Jones and the State Defendants have now filed separate motions for summary judgment, asserting that the claims against them do not present material issues for trial. Before addressing the substance of these motions, however, it is first necessary to set forth the appropriate legal standard.

LEGAL STANDARD

Summary judgment is appropriate when the record, viewed in a light most favorable to the nonmoving party, reveals that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Once a motion has been filed for summary judgment, the burden shifts to the nonmoving party to show through specific evidence that a triable issue of fact remains on issues on which the nonmovant bears the burden of proof at trial. *Celetex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The nonmovant may not rest upon mere allegations in the pleadings or upon conclusory statements in affidavits; it must go beyond the pleadings and support its contentions with proper documentary evidence. *Id.*

DISCUSSION

It is first necessary to address the attacks leveled by Defendants as to the conduct of Stagman in responding

to these motions for summary judgment. Specifically, the State Defendants contend that Stagman had failed to comply with Local Rule 12(n), asserting that the factual allegations he makes, and thus his attempts to create factual issues for trial, are unsupported by the record evidence. In addition, the State Defendants have filed a motion to strike two affidavits—one from Stagman himself, the other from Donald Morgan—from being considered in support of Stagman's case. The State Defendants contend that these affidavits contain vague and conclusory allegations which fall well short of meeting the requirements of Fed.R.Civ.P. 56(e). Though the State Defendants do seem to raise some meritorious concerns as to reliability of the evidence proffered by Stagman, the Court finds it unnecessary to conduct a line-item review of each and every paragraph of Stagman's 12(n) statement and its evidentiary basis. Instead, the Court will consider the State Defendants' concerns in light of the overall question as to whether Stagman has proffered sufficient evidence to warrant a trial in this case.

In Count II of his complaint (the only count implicating Jones and the State Defendants), Stagman asserts a § 1983 claim for deprivation of his First Amendment rights. Stagman contends that these Defendants retaliated against him for speaking out on union activities, specifically in his "analysis" memo and in running for union president. Allegedly in an attempt to silence this protected speech, Defendants are alleged to have conspired to remove Stagman from his positions as a union steward and a bargaining team member. Furthermore, Stagman asserts that his discharge from the Attorney General's Office also was in retaliation for his speaking out on union-related issues.

In this case, Stagman has alleged a free speech claim (to state his opinion on the tentative agreement) and an association claim (to run for and serve as union president), the analysis for each being the same. *See Gregorich v. Lund*, 54 F.3d 410, 414 fn. 4 (7th Cir. 1995). To establish a First Amendment retaliation claim under § 1983, Stagman must show that (1) the speech in which he was engaged was constitutionally protected under the circumstances, and (2) the defendants retaliated against him because of it. *Gustafson v. Jones*, 117 F.3d 1015, 1018 (7th Cir. 1997) (citations omitted). Furthermore, Stagman must demonstrate that he was deprived of this constitutional right to free speech while defendants were acting under color of state law. *See West v. Atkins*, 487 U.S. 42, 49 (1991).

Both Jones and the State Defendants assert that Stagman has failed to provide sufficient evidence to support his § 1983 claims in this case. The Defendants basically admit that Stagman had engaged in constitutionally protected activities under the First Amendment, instead disputing whether the actions taken against Stagman can be causally linked to that protected activity. The Court will consider the claims against each of the Defendants in turn.

I. Union President Richard Jones

Defendant Jones offers several reasons as to why he cannot be held liable for violating Stagman's right to free speech under the First Amendment. First, Jones argues that the evidence does not support the requisite causal link between Stagman's protected speech and the alleged

retaliatory response. Second, Jones argues that there is no evidence that he conspired with state actors to deprive Stagman of his positions with the union. Finally, Jones contends that Stagman had no constitutional right to any position with the union, and that therefore his removal from these positions cannot provide the basis for a § 1983 claim.

The Court agrees that Stagman's claim against Jones must fail for want of the requisite causal link between the protected activity and Jones' alleged retaliation. Jones is accused of retaliating against Stagman by removing him from his positions as a union steward and bargaining team member, each of which was effectuated by a letter from Jones dated May 26, 1995. Stagman's allegedly protected activities under the First Amendment—his "analysis", and running for union president—did not occur until three months later. Since Stagman's protected activities occurred *after* the alleged retaliation, the element of causation is clearly lacking. *See O'Connor v. Chicago Transit Authority*, 985 F.2d 1362, 1368 (7th Cir. 1993); *Cusson-Cobb v. O'Lessker*, 953 F.2d 1079, 1081 (7th Cir. 1992). Though Stagman responds by asserting that he was engaged in protected activity before May 26, 1995, such a conclusory assertion, without more, cannot meet his burden of proving causation. *See Wright v. Illinois Dept. of Children & Family Services*, 40 F.3d 1492, 1500 (7th Cir. 1994) (must produce "specific, nonconclusory allegations" linking plaintiff's speech to employer retaliation). Thus, since Stagman has not shown any causal link between his protected speech and Jones' alleged retaliation, his claim against Jones must fail on this basis.

Even if Stagman could establish that Jones' actions were in retaliation for Stagman's protected speech, Stagman's claim against Jones would alternatively fail because he has not demonstrated that Jones conspired with state officials. Since neither Jones nor the Union are alleged to be state actors, Stagman must establish that Jones was a willful participant in joint action with (in other words, conspired with) state actors to prevail on his § 1983 claim. *See e.g., Leahy v. Board of Trustees of Comm. College Dist. No. 508*, 912 F.2d 917, 921 (7th Cir. 1990). Stagman alleges that his removal from his union positions was the result of a conspiracy between Ludwig (a state actor) and Jones. Specifically, Stagman contends that Ludwig did not want him on the bargaining team, and that Ludwig sent Norma Medina to discuss removing Stagman with Jones. The evidence that Stagman cites in support of this theory, however, is entirely inadequate. Stagman's reliance on his own self-serving affidavit, in which he recalls Union Board member Thomasina Jeffers telling him that his removal fro the union positions was the result of a request from Ludwig and Medina, does not suffice to create a triable issue as to whether there was joint action with state actors. In addition, as pointed out in the State Defendants' motion to strike, the proffered affidavit from Donald Morgan is similarly inadequate. Though Morgan avers that "Ludwig dispatched Norma Medina to discuss removing Stagman from the collective bargaining team . . . with Jones", and that Medina in fact met with Jones and arranged that Stagman would be removed, he provides no foundational information for how he possessed this knowledge. Even if such foundation was provided, Morgan's recitation of these communications is inadmissible as hearsay. Thus, the evidence

offered by Stagman in support of his argument that Jones conspired with state actors is insufficient to support his § 1983 claim.

Finally, Stagman's allegations concerning the decision to remove Stagman's name from consideration for union president have no merit. Since Stagman had been terminated from his position with the Attorney General's Office on December 8, 1995, and had been suspended from work for the two days preceding the effective date of his termination on December 13, 1995, Jones and the Union officers reasonably concluded that Stagman could not be eligible for union office. Even if this was not a reasonable decision, there is no evidence of any conspiracy with state actors on this issue, and therefore no § 1983 claim can be asserted. Likewise, Stagman has not presented any evidence that Jones conspired with state officials to have Stagman arrested for the purpose of preventing Stagman from voting in the election. Thus, Stagman has not offered sufficient evidence to demonstrate the requisite joint action with state officials to hold Jones liable under § 1983.

For all these reasons, Jones' motion for summary judgment is granted.

II. State Defendants

The State Defendants have also filed a motion for summary judgment, asserting several reasons why there is insufficient evidence for Stagman's § 1983 claims to get to trial. Since the factual allegations against each Defendant are distinct, the Court will assess the case against each State Defendant separately.

A. Attorney General James Ryan

Stagman asserts that Illinois Attorney General James Ryan should be held liable for allegedly violating Stagman's First Amendment rights. The State Defendants argue that Ryan cannot be held liable since he was not personally involved in the decision to terminate Stagman. Furthermore, the State Defendants content that Ryan was not even aware of Stagman's protected Speech on union matters, and therefore the termination decision could not have been in retaliation for that speech.

The Court agrees that Ryan had nothing to do with the events giving rise to this lawsuit. Section 1983 liability cannot be premised on a theory of respondeat superior; instead there must be some personal involvement or responsibility for the constitutional deprivation. *See Vance v. Peters*, 97 F.3d 987, 993 (7th Cir. 1996), *cert. denied* 117 S.Ct. 1822 (1997) (official can be held liable under § 1983 if "deprivation occurs at his direction or with his knowledge and consent. That is, he must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye."); *see also Gossmeyer v. McDonald*, 128 F.3d 481, 495 (7th Cir. 1997). In this case, Ryan has averred that he had no personal involvement in the decision to terminate Stagman: he did not sign the charges against Stagman, he did not investigate Stagman's August 12 incident, he was not at the meeting at which it was decided that Stagman would be terminated, he did not see or review any documents relating to Stagman's discharge, and no reports concerning the investigation were forwarded to him. Given this non-involvement, Ryan cannot be held liable under § 1983.

Despite Ryan's averments otherwise, Stagman seeks to assert that Ryan was personally involved in the termination decision, citing an affidavit from Illinois State Senator Howard Carroll in support of this assertion. Senator Carroll's affidavit, however, merely states that Ryan advised him "that he had been required to fire Mr. Stagman based on the information provided to him by his staff. . ." In the Court's view, this statement does not call into question Ryan's averment that he was not personally involved in the termination decision, and that he was informed of the decision after it had already occurred. In light of all the evidence indicating that Ryan was not personally involved, Stagman cannot rest his entire case against Ryan on the basis of Senator Carroll's affidavit.

But even if Ryan was personally involved in the termination decision, there still is no evidence that Ryan had knowledge of Stagman's protected union activities. As the Court has already stated, a defendant must have knowledge of a protected activity in order to act in retaliation against that activity. *See O'Connor*, 985 F.2d at 1368. Ryan has averred that he did not know that Stagman was a member of the bargaining team, that he did not know about Stagman's "analysis", and that he was unaware that Stagman was running for any union positions. Without such knowledge, Ryan could not have been acting in retaliation for Stagman's engaging in these protected activities. Thus, Stagman's § 1983 claim against Ryan fails for either of these two independent bases, and summary judgment is appropriate.

B. Chief of the Department of Public Safety Joseph Claps

Like Stagman's claim against Ryan, the claim against Defendant Claps is similarly without merit. Once again, Stagman has failed to provide any evidence that Claps had knowledge of Stagman's union activities, and therefore a claim for retaliation cannot stand. Stagman strains to impute such knowledge to Claps, arguing that certain circumstantial evidence—the presence of Labor Counsel James Carroll at the meeting in which Stagman's termination was decided upon, Ludwig's apparent zeal to discuss Stagman's union activities with others, and the number and length of the meetings at which the August 123 incident was discussed—somehow indicates that Claps *must have* been informed about Stagman's protected activities. Stagman cannot rely on such unsupported speculation, however, to avert summary judgment on his claims. Without credible evidence that Claps had knowledge of Stagman's protected union activities, summary judgment in favor of Claps is warranted.

C. Chief of the Department of Administration Edward Ludwig

As for Defendant Ludwig, the same arguments that were made on behalf of Defendants Ryan and Claps are not similarly available to him. There is no dispute that Ludwig was personally involved in the investigation of the Stagman's Palos Heights incident, or that Ludwig had extensive personal knowledge of Stagman's protected union activities. Ludwig does, however, dispute whether the decision to terminate Stagman can be personally

attributed to him. Furthermore, Ludwig asserts that Stagman has failed to demonstrate he would not have been terminated "but for" his allegedly protected speech.

The Court agrees with Ludwig that the evidence clearly demonstrates that Ludwig was not involved in the ultimate decision to terminate Stagman. There is no dispute that Ludwig recommended that Stagman merely be suspended for a 10- or 20- day period for the August 12 incident. The evidence also lucidly establishes that Ludwig's recommendation as to the disciplinary action against Stagman was overruled by others in the Office that though Stagman's misrepresentation of himself as a peace officer merited more severe punishment. In fact, the affidavit of Morgan—rife as it is with speculation and hearsay in Stagman's favor—completely buttresses Ludwig's contention that the decision to fire Stagman was not his. Thus, despite Ludwig's knowledge of Stagman's union activities, and his alleged animus toward Stagman, the claim against Ludwig must fail because the evidence shows that Ludwig was not the person who decided to fire Stagman.

But even if the decision to fire Stagman could be attributed to Ludwig, the Court still finds Stagman's claim against Ludwig without merit. To avoid summary judgment against him, Stagman must also satisfy his burden under *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977). In *Mt. Healthy*, the Supreme Court held that a plaintiff bringing § 1983 claim based on the First Amendment must establish (1) that his conduct was constitutionally protected, and (2) that his conduct was a substantial or motivating factor in the adverse employment action taken by the defendant. *Id.* at 287. Even if

the defendant was "brimming over with unconstitutional wrath" against the plaintiff, the plaintiff cannot prevail on a § 1983 claim unless he can establish that the adverse action would not have occurred "but for" the constitutionally protected conduct. *Johnson v. University of Wisconsin-Eau Claire*, 70 F.3d 469, 482 (7th Cir. 1995) (*citing Button v. Harden*, 814 F.2d 382, 383 (7th Cir. 1987)). If the plaintiff meets his initial burden, the defendant must then demonstrate that he would have taken the same action in the absence of the protected conduct. *Johnson*, 70 F.3d at 782 (*citing Mt. Healthy*, 429 U.S. at 287).

In this case, the Court finds that Stagman has failed to meet his initial burden of showing that he would not have been discharged but for his union activities. Stagman admits that he abused his position with the Attorney General's Office to assist a friend in obtaining some police information. Without even getting into the dispute about whether Stagman referred to himself as a "sergeant" or not, this misconduct is enough to justify the Office's action to terminate Stagman. On such a claim as this, the Court is not concerned as to whether the disciplinary action was unfair or too harsh, but rather whether the alleged misconduct was the true motivation for imposing the discipline. *See Giannopoulos v. Brach & Brach Confections, Inc.*, 109 F.3d 406, 411 (7th Cir. 1997) (court should only focus on the honesty of the employer's explanations for its actions, not on whether its decision was wise, fair or even incorrect); *see also Bahl v. Royal Indem. Co..*, 115 F.3d 1283, 1290 (7th Cir. 1997). Thus, given that Stagman has admitted at least some wrongdoing, the Court will not interfere with the Office's decision

to terminate him for the August 12 incident. *See Bahl*, 115 F.3d at 1292 (federal courts should not assume role of "super-personnel departments.")

The Court is also unpersuaded by the evidence proffered by Stagman in an attempt to demonstrate pretext. First of all, nothing can be inferred from the timing of the discharge, as the discharge decision was made more than three months after Stagman had posted his "analysis". Second, although Stagman attacks the internal investigation of Callahan and others into the August 12 incident, a review of the record indicates that Callahan relied on the report of Sergeant Hankus of Palos Heights Police Department. Third, despite Stagman's attempts to portray Ludwig as bearing substantial animus against him, an exacting review of the evidence reveals little support for such a proposition. Stagman primarily relies on the affidavit of Donald Morgan for this proposition, an affidavit which is an amalgam of hearsay, speculation, and scant foundation for conclusory allegations—precisely the objections which would render the statements contained in this affidavit inadmissible at trial. The court finds the Morgan affidavit completely unreliable, and therefore Stagman's heavy reliance on its assertions unavailing. Hence, the Court finds no reason to believe that the Office's reason for discharging Stagman was pretextual, and therefore summary judgment is also appropriate for the claim against Defendant Ludwig.

CONCLUSION

For the following reasons, Defendants' motions for summary judgment are all granted.

Charles P. Kocoras
United States District Judge

Dated: March 24, 1998